Hamilton Plastic Products, Inc. *and* International Union of Operating Engineers, Local 660, AFL–CIO. Cases 10–CA–25444 and 10–RC–14133

November 30, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case presents the issues of whether the Respondent violated Section 8(a)(3) and (1) of the Act by more stringently enforcing breaktime policies and by discriminatorily discharging three employees; and whether the Respondent violated Section 8(a)(1) of the Act by threatening to cut employee pay to minimum wage levels in the event of unionization, by threatening to close the plant, and by creating an impression of surveillance.[1]

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hamilton Plastic Products, Inc., Hamilton, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Second Election omitted from publication.]

Keith R. Jewell, Esq. for the General Counsel.
Harry L. Hopkins, Esq. (Lange, Simpson, Robinson & Somerville), of Birmingham, Alabama, for the Respondent Employer.
Glen Crawford, Assistant Regional Director, International Union of Operating Engineers, of Jackson, Mississippi, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge in Case 10–CA–25444 was filed on July 22, 1991,[1] and an amended charge on September 11, by International Union of Operating Engineers, Local 660, AFL–CIO (the Union or Petitioner). Complaint issued on September 9,[2] and, as amended at the hearing, alleges that Hamilton Plastic Products, Inc. (Respondent or the Employer) threatened its employees with a pay cut to the minimum wage level and with closure of the plant if they selected the Union, and created the impression that the Union activities of its employees were under surveillance—all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). In addition, the complaint alleges that Respondent more stringently enforced its breaktime policies affecting employees, and discharged employees Dwayne Self, Jody Ingle,[3] and Kevin O'Mary because of their union activities, in violation of Section 8(a)(3) and (1) of the Act.

The petition in Case 10–RC–14133 was filed on June 14, and, pursuant to a Decision and Direction of Election by the Regional Director for Region 10, a secret ballot election was conducted on September 25 in the appropriate unit.[4] The tally of ballots showed that, of approximately 130 eligible voters, 49 cast valid votes for and 51 cast valid votes against the Petitioner. There were 7 challenged ballots and no void ballots. The Union filed timely objections to the conduct of the election.

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[1] On July 9, 1992, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding of union animus on the part of the Respondent, we do not rely on the testimony of Supervisor Posey (referred to by the judge in fn. 32) that he told other supervisors that the Respondent did not need a union.

[3] The judge ordered that Case 10–RC–14133 be remanded to the Regional Director with instructions to open and count the challenged ballots of Jody Ingle, Kevin O'Mary, and David Box, to count the irregularly marked ballot as a valid ''No'' ballot, and to issue to the parties a revised tally of ballots. In light of the additional ''No'' ballot found valid by the judge, to which no exceptions were filed, the three challenged ballots are no longer determinative. Therefore, we shall set aside the election and direct a new election.

[1] All dates are in 1991 unless otherwise stated.

[2] Respondent's arguments based on the issuance of the complaint 2 days before the amended charge are considered infra, sec. II,(G),(1).

[3] Ingle's name appears in the complaint as ''Jody Ingel.'' Respondent's separation notice lists him as ''Joe D. Ingle (Jody)'', R. Exh. 11, while a union campaign notice claiming authorization to use certain indicated names of employees spells it ''Jody Ingle'' (R. Exh. 17). I shall use the latter spelling.

[4] The appropriate unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Hamilton, Alabama, facility, but excluding all office clerical employees, guards and supervisors as defined by the Act.

On November 1, the Regional Director issued an order directing a hearing on the issues raised by the objections and the challenged ballots, and consolidated the representation and unfair labor practice cases for hearing.

These cases were heard before me in Hamilton, Alabama, on February 13, 1992. Thereafter, the General Counsel and the Respondent Employer filed briefs. On the basis of the entire record, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Alabama corporation with an office and place of business located at Hamilton, Alabama, where it is engaged in the manufacture of fiberglass tubs. During the calendar year preceding issuance of the complaint, a representative period, Respondent sold and shipped from its Alabama facilities goods valued in excess of $50,000 directly to customers located outside the State of Alabama, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Campaign*

The union campaign began in about the second week of June. On June 13, a few minutes after the starting time of 7 a.m., a group of employees comprising the Union's in-plant organizing committee notified Supervisor Lee Fikes[5] that they were forming a union, and offered him a sheet of paper with their names on it.[6] According to former employee Edna O'Mary, Fikes was angry, upset, ''trembling,'' and rejected the piece of paper. He said that the employees should see Respondent's president James A. Ballard, and then went toward the office.

On the date the petition in the representation case was filed, June 14, or shortly before, the Union delivered and mailed a letter to Respondent's president, James H. Ballard, notifying him of the existence of an in-plant organizing committee. This letter contained the names of 18 members of the committee.[7]

On June 14, the Union also demanded recognition and the commencement of bargaining.[8] On September 25, the day of the election, the Union distributed a circular containing the names of 89 employees claiming that they were union supporters.[9]

[5] The parties stipulated that Fikes was a supervisor within the meaning of the Act, and I conclude that he was an agent of Respondent.

[6] The meeting with Fikes is established by the uncontradicted testimonies of former employee Edna O'Mary, alleged discriminatee Dwayne Self, and current employee Cyndra Daniel.

[7] G.C. Exh. 4. Testimony of International Representative Mickey Dooley.

[8] R. Exh. 16.

[9] R. Exh. 17.

B. *The Alleged More Stringent Enforcement of Breaktime Policies*

1. Former policy

a. *Summary of the evidence*

Respondent provides two breaks for its employees of about 10 minutes each, at 9:10 a.m., and at 2:10 p.m. The beginning of the break is indicated by the sounding of a bell, and the end of a break by another ringing of the bell. Former employee Edna O'Mary, an inspector, testified that employees from her section had to walk almost the entire length of the building to reach the breakroom. O'Mary affirmed that, prior to the advent of the union campaign, employees did not return to their work stations until the second bell rang, and, after it rang might go to the bathroom or the water fountain before resuming work. There was no objection from management to this practice, according to O'Mary; Supervisor Tommy Mason participated in it.[10] Edna O'Mary also testified about the practice of leaving for the break at the first bell. For the first year that she worked at the plant, ''pro-union people'' were ''watched like a hawk,'' whereas employees favoring Respondent left early, before the first bell.[11] O'Mary averred that she protested this practice to Supervisor Mason.

Cyndra Daniel, an employee for several years, testified that employees did not return to work after the break until the second bell had sounded and that Supervisor Tommy Mason engaged in the same practice. Nobody from management said anything about this, according to Daniel.

Supervisor Tommy Mason asserted that there had been prior ''abuses'' of the break policy and that it was discussed at supervisory meetings. He himself had stayed in the breakroom until the second bell sounded. On the other hand, Mason contended, he would ''get on to them [the employees] pretty good,'' and correct the abuses. ''People get slack,'' according to Mason. Plant Manager E. J. Posey stated that there had been ''difficulties'' enforcing the break period ''for years and always will be.'' The Company's practice was to instruct the supervisors to ''try to get everybody back as quick as possible.''

b. *Factual analysis*

Cyndra Daniel was a current employee at the time of her testimony, and the Board's practice is to consider the testimony of an employee against the employer as especially worthy of belief since it is unlikely that the employee would engage in fabrication. *Pittsburgh Press Co.*, 252 NLRB 500, 504 (1980).[12] Daniel's testimony was corroborated by that of Edna O'Mary.[13] Both appeared to be more truthful witnesses

[10] The pleadings establish that Tommy Mason was a supervisor within the meaning of the Act, and I conclude that he was an agent of Respondent.

[11] O'Mary identified an employee, Paul Miller, as one who was given this privilege.

[12] See also *Air Products & Chemicals.*, 263 NLRB 341 fn. 1 (1982).

[13] Edna O'Mary's testimony about ''pro-union'' employees being ''watched like a hawk'' at the beginning bell for a year is not inconsistent with the beginning of the union campaign in June 1991, since pro and antiunion sentiment among the employees may have existed

Continued

than Mason and Posey. In addition, the very existence of a warning signal is to initiate action. On the premise advanced by Respondent's witnesses, there was no warning for employees to end the break and return to their work stations. Accordingly, because of the greater credibility of the General Counsel's witnesses, and the improbability of Respondent's premise, I conclude that Respondent's prior policy was to allow employees to remain on break until the second bell sounded, and—perhaps after a visit to the bathroom or the water fountain—to return to work.

2. The alleged change in policy

Current employee Cyndra Daniel testified that, at about 1 p.m. on June 13[14]—i.e., the same day that the organizing committee informed Supervisor Fikes about the Union—Daniel's supervisor, Tommy Mason, told ''us'' that from ''now on, before the second bell rang coming back from break or lunch (the employees) were to be in our work area ready to work.'' Daniel's testimony was corroborated by that of Edna O'Mary, who asserted that the change shortened the break period.[15]

Mason admitted that, in the summer of 1991, pursuant to instructions from higher management, he told the employees that they had to be back in their work areas when the second bell rang. I conclude that this took place on June 13. Mason also claimed that this was merely a continuation of former policy, a position which I have rejected.[16]

C. *The Alleged Threat to Cut Employee Pay to Minimum Wage Levels*

1. Summary of the evidence

Edna O'Mary's hourly wage rate was $6. She testified on direct examination that employee Paul Miller told her that employee pay would be reduced if the Union was recognized. O'Mary affirmed that she already knew this from the Union, but wanted to see whether her supervisor would ''lie'' to her about it. Accordingly, she asked Tommy Mason in mid-June whether her pay would be cut to $3.35. O'Mary averred that Mason replied: ''When the Union goes in, there'll be negotiations and your pay will be cut to three thirty-five.''

Mason acknowledged having a conversation with O'Mary about wages, but denied telling her that her pay would be cut to $3.35 if the Union came in. Instead, Mason contended, he told O'Mary, ''Everything's gotta be negotiated. You can make less money or you can make more.'' An inquiry from O'Mary about holidays and benefits elicited a similar response, according to Mason.

O'Mary denied this on cross-examination, which reads in relevant part:

> Q. Did you have a discussion with Mr. Mason about what would happen in negotiations, in contract negotiations?
>
> A. That's when we was talking about we'd get cut to three thirty-five an hour. Yes, sir, we did.
>
> Q. So, you talked about contract negotiations?
>
> A. No. That ain't what he said. He didn't say nothing about no contract.
>
> Q. What did he say?
>
> A. He said when the Union comes in that they would have negotiations and we would go back from what we were making right now to three thirty-five an hour.
>
> Q. Did he say he was going to be negotiating?
>
> A. He didn't say nothing about him.
>
> Q. Did he say you might get more or you might get less?
>
> A. Naw. He was talking that we would get less.
>
> Q. He never said that you might get more or less?
>
> A. No.
>
> . . . .
>
> Q. Was anyone else there beside the two of you?
>
> A. No . . . I told him (Mason) that Paul Miller had told me at the water cooler that if this Union come in that we was gonna be cut back to minimum wage, and I wanted to know if it was so. . . .
>
> Q. So, he answered your question.
>
> A. Naw. He didn't answer it the way like—
>
> Q. The way you wanted him to?
>
> A. Naw, that ain't what I'm talking about
>
> . . . .
>
> Q. Well, did you ask him were your wages going to be cut back to the minimum if the Union came in?
>
> A. No. I asked him was our wages gonna be cut. He said, ''Well, what Paul was talking about, if the Union comes in, you will go back to three thirty-five.'' That's exactly his words that he said.
>
> Q. Oh. He was telling you what Paul was talking about? Another employee?
>
> A. Naw. He told me. He was the supervisor. He was the one I was wanting to know about my paycheck. If my paycheck was gonna get cut back.

2. Factual analysis

Respondent points to O'Mary's asserted inconsistency as to whether she and Mason talked about ''negotiations,'' or ''contract negotiations,'' and whether Mason was merely repeating what Paul Miller had said.[17] Also, her testimony varied on whether she or Mason first mentioned the figure of $3.35. None of these arguments has merit. O'Mary was an unsophisticated witness without detailed knowledge of collective bargaining or labor law. The transcript fairly reflects her version of the conversation, to wit, that Mason told her

prior to the advent of the campaign. Nor is O'Mary's testimony about the practice at the first bell inconsistent with her testimony about practice at the second bell.

[14] The digit and letters ''1th'' on p. 77, L. 14 of the transcript are hereby corrected to read ''13th.''

[15] Edna O'Mary testified on direct examination that, at about 10:10 a.m. on June 13, Supervisor Mason told employees that they were to return to work ''when the second buzzer went off.'' On cross-examination, O'Mary clarified this so as to aver that Mason said the employees had to be back at their work stations when the second bell rang.

[16] O'Mary testified that Ruby Palmer, stipulated by the parties to be a supervisor, stood outside the breakroom with a pencil and piece of paper for 2 weeks after June 13. Daniel stated that Palmer stood at the front-end repair department ''like she was trying to intimidate everyone, like she was taking names.'' Palmer denied O'Mary's and Daniel's testimonies. I consider it unnecessary to make a credibility resolution on this issue, in light of my finding above concerning the statement of Tommy Mason.

[17] R. Br. pp. 10–13.

wages would be reduced to $3.35 if the Union came in. He did not say that wages could be more or less. O'Mary was a more truthful witness than Mason, and I credit her account of this conversation.

D. *The Alleged Threat to Close the Plant*

During the lunch hour on June 27, Edna O'Mary distributed to employees a document outlining employee rights under the Act.[18] She testified that, after lunch at about 12:15 p.m., Plant Supervisor E. J. Posey[19] ''came directly'' up to her at her work station and said, ''What is the Union trying to do? Close the plant down? O'Mary denied this, whereupon Posey asked, ''What about the dollar raise that they offered you?'' O'Mary said she had no knowledge of a raise, whereupon Posey called her a ''liar.'' O'Mary denied this, and Posey repeated the accusation. O'Mary described Posey as ''red in the face,'' with his feet constantly moving.

Posey described a conversation with O'Mary which took place as he was criticizing the work performance of another employee at the latter's work station. He could not remember the date of the conversation. Posey asserted that he told the other employee that Respondent could not stay in business with the kind of work being performed by the other employee. According to Posey, O'Mary, whose work station was ''right in the same area,'' entered the conversation and said that it would be unlawful for Respondent to close its plant. There was a discussion of plant closings by other employers. Posey denied threatening to close Respondent's plant if the Union came in, and denied calling O'Mary a liar.

Because Posey could not remember the date of this conversation, and because it involved another employee and other topics at the other employee's work station, I conclude that Posey was testifying about a different conversation from the one described by O'Mary. His denial that he threatened to close the plant down does not directly meet O'Mary's charge that he asked whether the union was trying to close the plant. I credit O'Mary's testimony that he asked this question on June 27, immediately after O'Mary had distributed a prounion document to employees.

E. *The Alleged Impression of Surveillance*

International Representative Mickey T. Dooley testified about a conversation that he and Union Representative Crawford had with Respondent's president, James H. Ballard, on July 12.[20] Dooley sought the meeting on behalf of employee Renee Creekmore, who had been sent home. Creekmore had engaged in union activities, and Dooley asked Ballard whether he was aware of them. Ballard replied that he knew everybody in his plant that was working for the Union. Renee Creekmore was present when Ballard made this statement. Dooley's testimony is uncontradicted and is credited.

F. *The Alleged Discriminatory Discharges*

1. Background

The complaint alleges that Dwayne Self, Jody Ingle, and Kevin O'Mary were discharged on June 28 because of their union activities. Self was a member of the in-plant organizing committee, attended union meetings, and was one of the employees that met with Supervisor E. J. Posey on June 13. Self's name appears on the Union's letter delivered to Respondent's President Ballard at the same time.[21] Kevin O'Mary is the son of union activist Edna O'Mary, and signed a union card on June 15. Jody Ingle attended union meetings in mid-June, and signed a union card.

Self, Ingle, and O'Mary worked in the same department as finishers, a job in which they buffed out imperfections in the plastic tubs which the Company produced. They worked a shift from 7 a.m. until 3:30 p.m. There was no later shift. However, Respondent frequently ordered overtime work, and employees were required to perform it. The Company's practice was to have finishing department Supervisor Shirlene Posey—the wife of plant manager E. J. Posey—verbally notify employees of overtime work prior to the 3:30 p.m. quitting time. In the absence of such notice, the employees could clock out and leave.[22] Respondent argues that Shirlene Posey notified the alleged discriminatees of overtime work on June 27, that they failed to perform it, and were discharged for this reason the next day, June 28. Respondent elicited testimony that other employees had been discharged for the same reason. The General Counsel contends that there was no such notification.

2. The events of the week of June 24

a. *Summary of the evidence*

The day of the discharges, June 28, fell on a Friday, and the asserted failure to work overtime took place the prior day, June 27, a Thursday. Shirlene Posey testified that she told each of the three alleged discriminatees to work overtime ''on the day in question.'' She stated that she informed O'Mary before lunch, so that he could inform his mother. O'Mary drove to work with his mother. Posey also asserted that she informed Edna O'Mary before lunch that her son, Kevin, would have to work overtime.

Each of the three alleged discriminatees denied that Shirlene Posey told him to work overtime ''on June 27,'' with specific reference to that date. Accordingly, they clocked out and left. Self testified that 30 employees worked overtime, but that he did not know this until the following day, and that he had previously left at 3:30 p.m. while others worked overtime. Ingle testified to the same effect, and stated that the other people working overtime were employees in the repair department.

There is evidence that the three alleged discriminatees did work overtime previously in the same week, but the evidence is also conflicting as to the day this took place. Kevin O'Mary testified that he worked overtime on the prior Mon-

[18] G.C. Exh. 3.

[19] The complaint alleges and the answer denies that Posey was a supervisor. Posey testified that his position was the ''Plant Supervisor,'' that he has supervisors under him, and that he had a role in the decision to terminate the three alleged discriminatees in this proceeding. I conclude that Posey was a supervisor within the meaning of the Act, and an agent of Respondent.

[20] The pleadings establish that Ballard was a supervisor within the meaning of the Act, and I conclude that he was an agent of Respondent.

[21] G.C. Exh. 4.

[22] Testimony of Plant Manager E. J. Posey.

day or Tuesday, but not ''the day before.'' Supervisor Shirlene Posey was asked about the same subject, and testified:

> Q. Are you familiar with the day the events occurred leading to their termination?[23]
> A. Yes, sir.
> Q. Do you remember the day before that day?[24]
> A. Yes, sir.
> Q. Do you remember anything about Mr. O'Mary?
> A. I remember that he was supposed to work after three-thirty and he said his transportation was broken down and for me to tell his mama.
> Q. Did he work overtime that day before?
> A. Yes, sir.
> Q. And the other two persons as well?
> A. Yes, sir.
> Q. Did you tell his mother?
> A. No. Not that day.
> Q. When did you tell her?
> A. I told her about [it] the next day. About four o'clock. I went to the back.
> Q. That day?
> A. That day, yes.
> Q. That day you told his mama?
> A. That day about four o'clock.
> Q. And what did you tell his mama?
> A. I told her I was sorry. I had forgot to tell her that he would work over, but he would be out in just a few minutes.

Shirlene Posey further testified that she first discovered that the three employees were not working overtime ''on the day in question'' a little after 3:30 p.m. She assigned other employees to the buffing jobs, and notified E. J. Posey and Company president Ballard. A decision was made to terminate the employees, and Shirlene Posey picked up their timecards. The next morning, Posey saw them in the hallway, told them to come tot he office, and handed them their checks. When Posey informed them that the reason was their failure to work overtime the prior day, ''they started arguing'' and denied that they had been notified.

Jody Ingle reported a conversation with Shirlene Posey at the time of the discharges. According to Ingle, he asked for the reason, and Posey replied that it was the failure to work overtime the prior day. She stated that she notified Ingle ''after lunch.'' Ingle denied this, and Posey repeated her statement. Ingle again denied it, and Posey said, ''Well, I told Kevin [O'Mary] to tell y'all after lunch.'' Ingle repeated that nobody had notified him. Kevin O'Mary testified that Ingle did not say anything in the office. However, as indicated, Shirlene Posey affirmed that ''they started arguing.'' Posey did not testify specifically about the statements attributed to her by Ingle.

b. *Factual analysis*

A fair reading of Shirlene Posey's testimony is that the three employees did work overtime on Wednesday, June 26, and that Kevin O'Mary asked Posey to notify O'Mary's mother about this, since O'Mary rode to work with his mother. However, Shirlene Posey did not notify Edna O'Mary on Wednesday but did so the following day at 4 p.m., with a statement that Kevin O'Mary would be out in a few minutes. However, Posey also testified that Kevin O'Mary and the other two employees did not work overtime on Thursday, June 27, but, instead, left at 3:30 p.m. O'Mary presumably left with his mother. Yet Posey claimed that she informed Edna O'Mary at 4 p.m. (after Kevin had left) that her son would be out in a few minutes. This testimony is internally inconsistent.

I also note that Posey does not state precisely the date of the asserted failure to work overtime, whereas the employees were precise in their averments that on June 27, the day before their discharges, they were not notified to work overtime. I credit Ingle's uncontradicted testimony that, during the exit interview on June 28, Shirlene Posey first asserted that she had notified Ingle, and then said that she had told Kevin O'Mary to notify the other two employees. This constitutes an additional inconsistency in Shirlene Posey's version of the events of June 27. Because of Posey's inconsistencies, her ambiguity as to the exact date that the employees assertedly failed to work overtime, the greater precision on this issue by the employees, and the fact that they appeared to be more truthful witnesses, I credit their testimonies that they were not told to work overtime on June 27.

G. *Legal Analysis and Conclusions*

1. The filing of the amended charge after issuance of the complaint

The original charge, filed on July 22, alleges that Respondent violated the Section 8(a)(1) and (3) of the Act in various respects, including the discharges of the three alleged discriminatees herein. It also alleges that Respondent unlawfully shortened its employees' breaktimes. The amended charge, filed on September 11, repeats these charges, and adds other allegations of 8(a)(1) violations, four of which are included in the complaint.

Respondent concedes that it was not prejudiced regarding the alleged discriminatees or the breaktime allegations, but argues that the amended charge ''nullified'' the original charge, that it was filed subsequent to rather than prior to, the complaint, and that Respondent did not have an opportunity to respond to the new allegations prior to issuance of the complaint and was thus ''forced to present a defense based on the bare allegations in the charge and in the complaint.''[25]

These arguments have no merit. There was a valid pending charge at the time the complaint issued, and the latter could include allegations not stated in the charge provided that they were closely related to the alleged violations. *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1982). As the Supreme Court has stated:

> Once its jurisdiction is invoked, the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

[23] Thursday, June 27.
[24] Wednesday, June 26.
[25] R. Br. pp. 3–4.

NLRB v. Fant Milling Co., 360 U.S. 301, 307–308 (1959).

The Board has recently set forth the factors it will consider in determining whether complaint allegations not stated in the charge are closely related to those that are included in it. Although the Board refers to untimely rather than unstated allegations, the same criteria of relatedness are applicable:

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequences of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

Applying the first test, the 8(a)(1) allegations in the complaint not included in the original charge involved the same legal theory as that stated in the 8(a)(1) allegation of the original charge, to wit, unlawful restraint or coercion of employees. The second test is also met, because the additional 8(a)(1) allegations in the complaint involved similar conduct during the same timeframe with the same object—defeat of the union campaign. Finally, a reasonable Respondent in this case would have preserved any evidence in its defense. Indeed Respondent did defend against the 8(a)(1) allegations not contained within the original charge, and did so with testimonial evidence. There was no contention of any loss of documentary evidence.

Respondent argues that it was ''forced to defend on the bare allegations of the charge and the complaint.'' However, ''[i]t is well settled that it is the complaint, not the charge, that is supposed to give notice to a respondent of the specific claims made against it.'' *Redd-I*, supra, 290 NLRB at 1117, fn. 12. Respondent was so notified by the complaint in this case, and its claim that the filing of the second charge somehow negated this notice has no merit.

2. The alleged violations of Section 8(a)(1)

a. *The threatened reduction in wages*

The credited evidence shows that a supervisor told an employee who was making $6 hourly that her wages would be cut to $3.35 if the Union came in. This was obviously coercive under established Board law, and I conclude that Respondent thereby violated Section 8(a)(1) of the Act.[26]

b. *The threat that the plant would be closed*

The record shows that, immediately after an employee distributed a prounion circular to other employees, a supervisor asked her whether the Union was trying to close the plant.

Since only the employer could close its own plant, the clear import of this question was that the Union's attempt to seek recognition might cause Respondent to close the plant. Although phrased as a question rather than a direct statement, the communication was nonetheless coercive. *Sheller-Globe Corp.*, 296 NLRB 116 (1989).

No reason other than unionization as the cause of the plant closing is inferable from the question. The Supreme Court has announced the standard for evaluation of such communications:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization (authority cited). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

In this case, there is no evidence that the supervisor predicted any economic necessity which would compel the employer to close the plant in the event the employees selected the Union. The clear implication is that he would take it on his own initiative for reasons unrelated to economic necessity. In so doing, Respondent coerced its employees in violation of Section 8(a)(1).[27]

c. *The alleged impression of surveillance*

(1) Factual summary

On June 13, the members of the Union's in-plant organizing committee met with Supervisor Fikes. At about the same time, the members of the committee, 18 in number, were identified in a letter from the Union to Respondent's president Ballard.

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[26] *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), and authorities cited.

[27] See also *Overnite Transportation Co.*, 296 NLRB 669 (1989); *Massachusetts Coastal Seafoods*, 293 NLRB 496 498 512 (1989); *Madison Industries*, 290 NLRB 1226, 1230 (1988).

On July 12, Ballard told two union representatives, in the presence of employee Renee Creekmore, that he knew everybody in his plant that was working for the Union.

On September 25, the day of the election, the Union distributed a circular naming 89 employees as union supporters. During the election, 49 employees voted for the Union, exclusive of challenged ballots.

(2) Legal analysis

Respondent argues that ''the identity of those working on behalf of the Union was public knowledge.'' In support of this assertion, Respondent cites the fact that the names of 18 members of the in-plant organizing committee were made known to Respondent at about the time the petition was filed on June 14, and that Edna O'Mary and Creekmore were known to have distributed union leaflets.[28]

It is obvious that the Union had more supporters than the members of the in-plant organizing committee whose names were sent to Respondent in early June. Alleged discriminatee Kevin O'Mary signed a union card, while Jody Ingle did the same and attended union meetings. They were not members of the committee. These facts, the showing of interest which the Union had to submit in support of its petition for an election in a unit of about 130 employees, and the actual number of employees voting for the Union during the election warrant an inference that there were more employees supporting the Union than the 18 listed members of the in-plant organizing committee. Although the Union published the names of 89 asserted supporters, this did not take place until the day of the election, on September 25, well after Ballard's statement to the union representatives and Creekmore on July 12. I therefore reject Respondent's argument that the names of the union supporters were public knowledge.

An initial issue is whether Ballard's statement referring to employees ''working'' for the Union may be equated with union supporters. I conclude that the distinction is too fine for the average employee to have made, and that Ballard's statement could reasonably have caused an employee who supported the Union to believe that he was included in the class referred to by Respondent's president.

The Board has held that an employer's statement of knowledge of the identities of union supporters creates an unlawful impression of surveillance of the employees' union activities. *Elston Electronics Corp*., 292 NLRB 510, 527 (1989); *Honeycomb Plastics Corp*., 288 NLRB 413, 420 (1988). Similar statements of employer knowledge of the union activities of its employees have also been held to be unlawful.[29]

If the employer may have gained knowledge of the union activities by means other than surveillance, this may negate an inference that such knowledge was acquired by surveillance.[30] However, other than the open declaration by the Union of the identities of the members the in-plant organizing committee, and leafletting by O'Mary and Creekmore, there is no evidence in this case of alternative means by which Respondent could have acquired knowledge of the identities of the remainder of the union supporters. Accordingly, the employees could appropriately infer that such knowledge was acquired by surveillance. I conclude that Respondent, by its president's statement on July 12, described above created an unlawful impression of surveillance of its employees' union activities, and violated Section 8(a)(1) of the Act.

3. The alleged violations of Section 8(a)(3)

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in Respondent's decision to enforce its breaktime policies more stringently, and to discharge the alleged discriminatees. Once this is established, the burden shifts to Respondent to demonstrate that such actions would have taken place for a legitimate reason regardless of the protected activities. The General Counsel may then offer evidence that the employer's proffered ''legitimate'' explanation is pretextual—that the reason either did not exist or was not in fact relied upon—and thereby conclusively restore the inference of unlawful motivation.[31]

Respondent's unlawful threats to reduce wages and to close the plant if the Union came in, and its creation of an impression of surveillance of its employees' union activities, establish its antiunion animus.[32]

As set forth above, on the afternoon of the same day that the organizing committee informed Supervisor Fikes about the union campaign, Respondent more stringently enforced its breaktime policy by requiring employees to be at their work stations when the second bell rang. Respondent's animus, and the timing of the change in its breaktime policy, immediately after learning about the union campaign, establish the General Counsel's prima facie case that protected activity was a motivating factor causing Respondent to engage in the action.

Respondent contends that the requiring employees to be at their work stations when the second bell rang had always been its policy, which had been abused, and that it was merely enforcing prior policy.[33] However, the credited evidence shows that employees in fact were allowed to remain on break until the second bell rang, and only then were required to return to their work stations. Supervisor Tommy Mason himself followed this policy. Accordingly, Respondent in fact did make a change, and its asserted ''legitimate'' reason of merely enforcing prior policy is pretextual. I conclude that the change was discriminatorily motivated, and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989).

With reference to the discharges of Dwayne Self, Kevin O'Mary, and Jody Ingle, Respondent had knowledge of their

[28] R. Br. pp. 31–32.

[29] *NLRB v. Gold Standard Enterprises*, 679 F.2d 673, 676 (7th Cir. 1982); *Contract Cleaning Maintenance*, 289 NLRB 995, 1014 (1988).

[30] *Lotts Electric Co*., 293 NLRB 297 (1989) (knowledge gained by interrogation of employees); *Times Wire & Cable Co*., 280 NLRB 19 (1986) (the organizers regularly and openly solicited employee support, and the employer's statement was intended to dispel a rumor of surveillance).

[31] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[32] In addition to the 8(a)(1) violations, Supervisor E. J. Posey testified that he told other supervisors that Respondent did not need a Union.

[33] R. Br. pp. 23–25.

union activities. The Union explicitly notified Respondent of Self's membership on the in-plant organizing committee, and he was one of the committee members who met with Supervisor Fikes. Although Kevin O'Mary's and Jody Ingle's level of support was less than Self's, both signed union cards, and Ingle attended union meetings. Respondent's president Ballard told the Union that he knew everybody in the plant who was working for the Union. I conclude that this statement establishes Respondent's knowledge of the support of the Union by O'Mary and Ingle, as well as its obvious knowledge of Self's role in the union campaign.

Respondent's predicate for the discharges of the employees on June 28 was their failure to work overtime on June 27. It is undisputed that it was Respondent's policy to allow employees to leave at the end of their shift unless notified to work overtime, and that, with reference to these employees, the notifying supervisor was Shirlene Posey. The credited evidence shows that the three employees were not so notified on June 27, and that Shirlene Posey gave conflicting explanations to Ingle as to the manner in which the asserted notification was made.

The same antiunion animus which establishes the illegality of Respondent's change in its break policy establishes a prima facie case that the discharges were also unlawfully motivated. Although Kevin O'Mary's and Jody Ingle's union activities were not as extensive as Dwayne Self's, they were nonetheless union supporters and were discharged at the same time for the same false reason. It is well settled that when a Respondent's stated motive for its discipline of an employee is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the Respondent desires to conceal. This principle adds support to the inference, established by other evidence, that the discharges were motivated by antiunion animus. Respondent's asserted reason for the discharges did not in fact exist, and the reason was pretextual. The Board has concluded in a similar case that the employer's discipline of employees was unlawful. *Fast Food Merchandisers*, 291 NLRB 897 (1988).

I conclude that Respondent's discharges of Dwayne Self, Kevin O'Mary, and Jody Ingle on June 28, 1991, were discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Hamilton Plastic Products, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 660, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent committed unfair labor practices within the meaning of Section 8(a)(1) of the Act,

(a) By threatening employees with a reduction in pay if the Union came in;

(b) By threatening to close the plant if the employees selected the Union as their bargaining representative; and,

(c) By creating an impression among its employees that their union activities were under surveillance.

4. Respondent violated Section 8(a)(3) and (1) of the Act,

(a) By changing its breaktime policy so as to require employees to be at their work stations when the second bell sounded, designating the end of the break, rather than adhering to its former policy of allowing employees to continue on break until the second bell sounded, because of its employees' protected activities; and,

(b) By discharging Dwayne Self, Kevin O'Mary, and Jody Ingle on June 28, 1991, because of their protected activities.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate toe purposes of the Act.

It having been found that Respondent unlawfully changed its breaktime policy, it is recommended that Respondent rescind such change, and inform employees by appropriate notice that they may continue to remain on break until the second bell sounds.

It having been found that Respondent unlawfully discharged employees Dwayne Self, Kevin O'Mary, and Jody Ingle on June 28 1991, it is recommended that Respondent be ordered to offer each of them immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, dismissing, if necessary any employee hired to fill said position, and to make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of many equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less any net interim earnings, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[34]

It is also recommended that Respondent to be ordered to post appropriate notices, to expunge from its personnel records all references to its unlawful discharges of Dwayne Self, Kevin O'Mary, and Jody Ingle, and to notify each of them in writing that such expunction has been made and that evidence of his unlawful discipline will not be used as a basis for future personnel actions against him.

III. THE OBJECTIONS

Petitioner filed five objections to the election. Three of these mirror complaint allegations in the unfair labor practice proceeding. Thus, Petitioner alleges that the Employer threatened employees with a pay cut if they selected the Union, also threatened them with plant closure for the same reason, and created an atmosphere of fear by unjustly firing union

[34] Under *New Horizons*, interest is computed at the ''short term'' Federal rate for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

supporters.[35] As I have already concluded that the Employer did engage in such conduct, these objections have merit, and are sustained.

Of the remaining two objections, one alleges that the Employer failed to provide the Union with an accurate and up-to-date ''*Excelsior*'' list.[36] The Employer submitted two ''*Excelsior*'' lists to the Petitioner at different times, because an earlier election date was changed. Both lists are in evidence. Each contains, in alphabetical order, the typed names of 118 employees, their apparent street addresses, city, State, and zip code.[37] Petitioner's business manager, Jimmy Kuykendall, testified that he made house calls on the basis of the lists, and that on ''several occasions'' he was unable to find the employees at the listed address.

The Board has considered objections based on omitted names of employees, and on inaccuracies in addresses. It considers the former to be a more serious objection. *Thrifty Auto Parts*, 295 NLRB 1118 (1989). In *Lobster House*, 186 NLRB 148 (1970), which involved inaccurate addresses, the Board held that it will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule, and that 16 erroneous addresses out of 97 did not constitute grounds for such action.[38]

In this case, Petitioner has presented evidence that ''several'' out of 118 addresses were incorrect. This does not meet the standard set out in *Lobster House*. Accordingly, this objection lacks merit, and is overruled.

The last objection alleges that the Employer, on the day of the election, coerced employees to vote against the Union.[39] Petitioner did not present any evidence in support of this objection. Accordingly, it is overruled.

IV. THE CHALLENGED BALLOTS

A. *Jody Ingle and Kevin O'Mary*

The ballots of Jody Ingle and Kevin O'Mary were challenged,[40] apparently by the Employer. I have already determined that O'Mary and Ingle were unlawfully discharged prior to the election. It is settled law that such employees are entitled to vote in a Board election. Accordingly, these challenges are overruled.

B. *Jackie Hollis*

Hollis was discharged prior to the election, and an unfair labor practice charge was filed. The charge was dismissed, the dismissal was appealed, and the appeal was denied. Hollis was not employed on the day of the election, and his name was not on the ''*Excelsior*'' list. The Board agent challenged his ballot and, under applicable Board law, the challenge is sustained. *Roy Lotspeich Publishing Co*., 204 NLRB 517 (1973).

C. *David Box*

David Box was injured on the job in March 1991, and was released by the doctor for work on September 11, with the limitation of no overhead work.[41] His name was not on the list at the time of the election on September 25, and his ballot was challenged by the Union. Box had apparently returned to work by October, according to a dental report.[42] The parties stipulated that he was receiving worker's compensation benefits prior to his return.

The First Circuit Court of Appeals has engaged in an extensive discussion of Board cases and the opinions of commentators on the voting eligibility of employees on sick leave. After considering various approaches to the issue, the court concluded that the applicable principle is that there is a rebuttable presumption that an employee on sick leave continues to remain in that status. *NLRB v. Newly Weds Foods*, 758 F.2d 4 (1st Cir. 1985), enfg. 270 NLRB 357 (1984).

There is nothing to rebut the presumption of Box' continuing status as an employee while receiving worker's compensation benefits. He was actually released for work about a week before the election, but his name had not yet been placed on the payroll. I conclude that the challenge to his ballot should be overruled.

D. *Chris Clark*

Chris Clark is the step son-in-law of James Ballard, Respondent's president and owner of all of its stock. Ballard has no natural children, but does have two stepchildren, one of whom, Rhonda, is married to Clark. Rhonda Clark is a secretary in Respondent's office, and she and Ballard's wife sign Respondent's payroll checks. Plant Manager E. J. Posey is Ballard's brother-in-law. Ballard stated that Posey and his wife, Shirlene Posey, are ''cousins by marriage'' of Chris Clark.

Ballard testified that Chris Clark is a forklift operator, that he receives the same pay and pension benefits as other employees, abides by the same rules, and enjoys no special privileges. However, Ballard also testified that Chris and Rhonda Clark have a daughter, Ballard's granddaughter. When she leaves school she is allowed to come to the plant and remain until her mother gets off work. Ballard will not permit the children of other employees to remain at the plant after school.

I conclude that the facts that Clark's daughter is allowed to remain at the plant after school, unlike the children of other employees, that his wife signs payroll checks, and that he enjoys a family relationship with other members of management establish that he has a special status and is more closely aligned with management than with rank-and-file employees. *Holthouse Furniture Corp*., 242 NLRB 414 (1979).[43]

E. *Steve Cain*

1. Summary of the evidence

Steve Cain originally worked in the repair department at Respondent's Hamilton facility beginning in about 1987. He

[35] G.C. Exh. 2(b), Exh. A, Objections 2, 3, 4.

[36] Ibid., Objection 5.

[37] C.P. Exhs. 1, 3.

[38] See also cases cited in *Thrifty Auto Parts*, supra, 295 NLRB 1118 fn. 9.

[39] G.C. Exh. 2(b), Exh. A, Objection 1.

[40] G.C. Exh. 2(b), Exh. B.

[41] R. Exh. 15.

[42] Ibid.

[43] See also *NLRB v. H. M. Patterson & Son, Inc*., 636 F.2d 1014 (5th Cir. 1981), enfg. 245 NLRB 1412 (1979).

testified that this work consists of repairing defects in the tubs as they come from the assembly line. About 2 years later, Cain became a ''serviceman.'' He travels to about 10 States and repairs tubs in customers' homes and at jobsites. According, to Cain, it is the same type of work which he did in the plant, and he uses the same tools.

Cain was asked how frequently he went out of state. He replied that ''it varies.'' ''Some weeks'' he works at the plant, depending on the requirements of outside work. Cain also estimated that he works in the plant 2 or 3 days a month, and that on some days he returns from a trip before the end of the day, and works at the plant. When he is in the plant, according to Cain, he works in the repair department 75 percent of the time, where the supervisor is Shirlene Posey.[44] Cain testified that he receives the same hourly rate and pension and vacation benefits as plant repair employees.

Respondent furnishes Cain with a pickup truck to do his work in the field, and he averages about 35,000 miles annually with the truck. The Company pays for the gasoline, hotel room, food expense, and a call home when he stays overnight in the field. He has a company telephone credit card. According to Cain, when he returns home late from a trip, he parks the truck at his house. This happens two to three nights a week. He picks up needed supplies at the plant. Cain denied that he drives the truck from his residence to the plant when he is working in the plant. Instead, he drives a personal car.

Cain has authority to purchase supplies in the field for less than $10. He is not required to clock in at the plant, but, instead, prepares his own timecard on Friday evenings, whether he has worked in the plant or the field. This includes overtime, and is always accepted by management. He goes over his ''paperwork'' with company president Ballard, who is his supervisor for field work.

Cyndra Daniel also testified about this issue. She started working at the plant in 1986, took leave in 1989, and returned to work in March 1990. She was assigned to the ''tub line,'' from which the entire warehouse is visible, and normally sees the other employees.

Daniel testified that the first time she became aware of Steve Cain as an employee was on the day of the election. He was then ''pushing tubs'' in the warehouse. She had never seen him previously. The only time she saw him since the election (September 25) was at a Christmas dinner at the plant. She did not see him at the plant the day before the hearing in this matter.

Daniel further testified that neither she nor any other employees is allowed to record the employee's own time, or independently schedule overtime. No other employee has a telephone credit credit card, or is allowed to park a company truck at home. No other employee travels to other worksites, or is paid expenses for doing so.

Although Cyndra Daniel testified twice during this proceeding, Respondent chose not to cross-examine her.

2. Factual and legal analysis

I credit Daniel's testimony that the first time she saw Cain was on the day of election, saw him again about 3 months later at a Christmas dinner, and has never seen him at any other time. I also credit her testimony that she could see the other employees in the plant.

The fact that Cain was seen in the plant only on two special occasions (the election, and Christmas dinner) casts doubt on his testimony about the time that he spends working there. Cain's testimony was inconsistent on this issue. First, he stated that he works in the plant ''some weeks,'' but then averred that he does so 2 or 3 days a month. If his field work requires him to repair tubs in 10 different States, it is difficult to see how he would be able to work any significant amount of time in the plant. For these reasons I conclude that Cain spends little or no time working in the plant.

Crediting Daniel, I conclude that Cain is the only employee who records his own time, schedules overtime, has a telephone credit card, is allowed to park a company truck at his house, does work outside the plant, or is paid expenses for doing so. There is no evidence that any other employee can make purchases for the company and be compensated. In addition, Cain is the only employee shown by the record to be supervised directly by the owner and president, James Ballard.

Although Cain may be considered to be a dual-function employee with the same salary, pension, and vacation benefits as other employees, his other perquisites not enjoyed by these employees and his separate supervision by Respondent's owner establish that he does not have a community of interest with the other employees. *Central Broadcast Co*., 280 NLRB 501, 511 (1986); *U.S. Pollution Control*, 278 NLRB 274 (1986). Accordingly, I shall recommend that the challenge to Cain's ballot be sustained.

F. *The Challenge to the Irregularly Marked Ballot*

Petitioner challenged a ballot on the ground that the voter's intention was unclear. The ballot asks whether the voters wishes to be represented by the Union and states that he is to mark an ''X'' in the ''square of [his] choice.'' The ballot contains two shaded rectangles, and, within each, a clear square. Over each square, within the shaded rectangle, appear the words ''Yes,'' and ''No,'' respectively. The voter placed four straight lines across the entire shaded rectangle enclosing the ''No'' square. Two of the lines cross the rectangle diagonally, and two bisect it on its long and short sides, respectively. The lines cross the clear ''No'' square. There is no discernible ''X'' within the square, at least, not one intentionally made. On the other hand, the two diagonal lines crossing the rectangle could be interpreted as an ''X.''[45]

Petitioner argued at the hearing that the voter ''made a spider web'' and tried to mark out the whole ''No'' ballot. Accordingly, it is a ''Yes'' ballot. Respondent argues to the contrary.[46]

The Board's cases on this issue turn on the specific nature of the ballot under scrutiny. Most of the cases sustain the validity of the ballot. In *Kaufman's Bakery*, 264 NLRB 225 (1982), two challenged ballots were marked with ''an 'X' and additional marks within the 'Yes' box.'' A Board majority concluded that the ballot was a valid ballot cast in favor of the union:

[44] Cain did not specify what he does in the plant when not working in the repair department.

[45] A copy of the ballot is attached as Appendix A [omitted from publication].

[46] R. Br. p. 40.

> In keeping with the Board's long-established policy of attempting to give effect to voter intent whenever possible, we will hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter. When a ballot reveals a clear ''X'' almost entirely contained within either the ''Yes'' box or the ''No'' box and no irregular markings appear outside the marked box, there can be little doubt but that the voter intends his vote to be counted in favor of or against, respectively, the designated labor organization [id.].

Member Fanning, dissenting, stated that this analysis involved ''an unwarranted degree of speculation'' and advocated a rule invalidating any ballot not cast according to its instructions (id. at 226).

In a case where the voter put the word ''No'' in both the ''Yes'' and ''No'' boxes, the Board concluded that the voter was merely emphasizing his opposition to union representation. *Harry Lunstead Designs*, 265 NLRB 799 (1983). In another case a voter wrote the word ''Non'' across both the ''Yes'' and ''No'' boxes of a ballot written in English and Spanish. The Regional Director concluded that it was unclear whether the voter was voting ''No'' or was rejecting the entire voting procedure. A Board majority disagreed, and concluded that the ballot was a valid ''No'' ballot. Members Johansen and Babson dissented, holding that the ballot was ambiguous. *Horton Automatics*, 286 1413 (1987).

In *Columbia Textile Services*, 293 NLRB 1034 fn. 4 (1989), the voter punched a hole in the box designating the Union, and the Board counted the ballot as a vote for the Union. Member Johansen, dissenting, concluded that the ballot was ambiguous.

In *Newly Weds Foods* (supra), however, the voter placed an ''X'' within the ''No'' box but printed the word ''Yes'' immediately above it. The Board adopted the Regional Director's determination that this was a void ballot, and the Court of Appeals for the First Circuit agreed. 758 F.2d at 12, 13.

The voter's intention in this case is not easy to assess. Petitioner's argument that the voter was attempting to ''mark out'' the ''No'' box and thus vote ''Yes'' is too strained to be acceptable. If the voter wanted to vote ''Yes'' he could have done so by placing an ''X'' in the ''Yes'' box.'' It is equally implausible that the voter was rejecting the entire voting procedure, since he placed his marks only in the shaded rectangle enclosing the ''No'' square.

Kaufman's Bakery establishes a presumption of a voter's intention when there is a mark in only one ''box.'' However the case does not define the word ''box,'' and an unsophisticated voter untutored in geometry might well conclude that it meant the rectangle enclosing a square and the word ''No,'' despite the instructions to place an ''X'' in the ''square.'' The real issue in this case is whether the ballot is sufficiently ambiguous to warrant rejecting it. Adhering to the Board's policy of giving effect to a voter's intent whenever possible, I conclude that the ballot in question sufficiently indicates the voter's intention to vote against the Petitioner. Accordingly, I shall recommend that the challenge be overruled, and the ballot be counted as a valid ''No'' ballot.

G. *Summary*

In summary, the challenges to the ballots of Jody Ingle, Kevin O'Mary, David Box, and to the irregularly marked ballot are overruled, and the latter should be counted as a valid ''No'' ballot. The challenges to the ballots of Jackie Hollis, Chris Clark, and Steve Cain are sustained. As noted, the Union was the only party filing objections to the election. The overruled challenged ballots should be opened and counted. If the Union receives a majority of the valid votes cast, the Regional Director should issue a Certification of Representative. On the other hand, if the Union fails to receive such majority, then the election should be set aside, and the Regional Director should conduct a second election. *Columbia Textile Services*, supra, 293 NLRB at 1038.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Hamilton Plastic Products, Inc., Hamilton, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with a reduction in pay if they select the International Union of Operating Engineers, or any other labor organization, as their collective-bargaining representative.

(b) Threatening its employees that it will close its plant if the employees select the above-designated labor organization; or any other labor organization, as their collective bargaining representative.

(c) Creating an impression among its employees that their union activities are under surveillance.

(d) Discouraging membership in the above-indicated labor organization by changing Respondent's breaktime policy so as to require its employees to be at their work stations when the second bell rings because of their protected activities, by discharging employees for the same reason, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(e) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dwayne Self, Kevin O'Mary, and Jody Ingle full reinstatement to their former positions, or, if any such position no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace any of them, and make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discharge of him on June 28, 1991, in the manner described in the remedy section of this decision.

(b) Expunge from its personnel records or other files any references to its unlawful discharges of Dwayne Self, Kevin

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

O'Mary, and Jody Ingle, and notify each of them in writing that such action has been taken and that evidence of his unlawful discharge will not be used as a basis for future personnel action against him.

(c) Rescind its rule requiring employees to be at their work stations when the second bell rings, reinstate its prior rule allowing them to remain on break until such time, and post notices to this effect at all places where notices to employees are usually posted.

(d) Preserve and, on request, make available to the Board or its agents for copying, all payroll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its facility in Hamilton, Alabama, copies of the attached notice marked ''Appendix B.''[48] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 10–RC–14133 be remanded to the Regional Director for Region 10, with instructions to open and count the ballots of Jody Ingle, Kevin O'Mary, and David Box, to count the irregularly marked ballot as a valid ''No'' ballot, and to issue to the parties a revised tally of ballots. If the revised tally indicates that Petitioner has received a majority of the valid votes cast, the Regional Director will issue a Certification of Representative. If the revised tally indicates that the Petitioner has not received a majority, then the Regional Director will set aside the election and conduct a second election.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of The United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities

WE WILL NOT threaten our employees that we will reduce their pay or close the plant if they select the International Union of Operating Engineers Local 660, AFL–CIO or any other labor organization, as their collective-bargaining representative.

WE WILL NOT create among our employees an impression that their Union or other protected activities are under surveillance.

WE WILL NOT discourage membership in the above-indicated labor organization, or any other labor organization, by changing our break policies so as to require employees to be at their work stations when the second bell rings, because of their protected activities, by discharging employees for the same reason, or by otherwise discriminating against our employees with respect to their hire, tenure of employment, or terms and conditions of employment.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dwayne Self, Kevin O'Mary, and Jody Ingle reinstatement to their former positions, without any loss of their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered, with interest, because of our unlawful discharges of them.

WE WILL expunge from our records any references to our unlawful discharges of Dwayne Self, Kevin O'Mary, and Jody Ingle, and notify them in writing that this has been done and that evidence of these discharges will not be used as a basis for future personnel actions against them.

WE WILL rescind our rule requiring employees to be at their work stations when the second bell rings, reinstate our prior rule allowing employees to remain on break until this bell rings, and post appropriate notices of this change.

HAMILTON PLASTIC PRODUCTS, INC.